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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1706

THE DEPARTMENT OF REVENUE OF THE STATE OF WASHINGTON,
Petitioner,

v.

ASSOCIATION OF WASHINGTON STEVEDORING COMPANIES, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF RESPONDENTS

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v.

ASSOCIATION OF WASHINGTON STEVEDORING COMPANIES, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF RESPONDENTS

QUESTIONS PRESENTED

1. May the flat prohibition of the Import-Export Clause be abridged to permit an excise on the moving of imports and exports through a seaport—merely because the excise is apportioned and allegedly not designed to discriminate?

2. Under the Commerce Clause, may a state that has a "nexus" with an interstate carrier impose an excise on movement of goods through a seaport—merely because the tax is apportioned and allegedly not designed to discriminate?

STATEMENT OF THE CASE

A. & B. Nature of the Case; Parties.

Respondent is satisfied with Petitioner's description of the case and the parties.

C. Business of the Stevedores.

Respondent's petition to the Washington Superior Court pleaded at paragraph VI:

> "The private stevedoring companies that constitute the petitioner, Association of Washington Stevedoring Companies, are engaged in the same stevedoring activities that were held not taxable in *Puget Sound Stevedoring Co., supra*. Many of the members of petitioner, Washington Public Ports Association, are also engaged in such activities." (A. 5)

Petitioner expressly admitted that pleading. (A.7) Thus the facts of *Puget Sound Stevedoring Co. v. Tax Commission*, 302 U.S. 90 (1937), have been incorporated by reference and become the facts of the instant case.

In *Puget Sound*, this court recited the following pertinent facts:

> "Appellant . . . is engaged in the general stevedoring business at Seattle and at other ports on Puget Sound. . . .
>
> . . . .
>
> " 'Formerly the work was done by the ship's crew; but, owing to the exigencies of increasing commerce and the demand for rapidity and special skill, it has become a specialized service devolving upon a class "as clearly identified with maritime affairs as are the mariners." '
>
> . . . .
>
> "What was done by this appellant in the business of loading and unloading was not prolonged beyond the stage of transportation and its reasonable incidents. . . . It took in the work of carriage to and from the 'first place of rest,' which means that it covered the space

> between the hold of the vessel and a convenient point of discharge upon the dock. . . . [N]o matter by whom the work is done or paid for, 'stevedoring services . . . always commence in the hold of the vessel and end at the "first place of rest," and vice versa.' . . . The movement is continuous, is covered by a single contract, and is necessary in all its stages if transportation is to be accomplished without unreasonable impediments." 302 U.S. at 91-93.

The line drawn by *Puget Sound* defining the extent of the water carriers' responsibility for cargo ("place of rest" of the cargo), comports with the responsibility of such carriers under maritime common law, federal statutes and international agreements governing the carriage of goods by sea. *See* part IV, *infra*.

D. Nature of the Tax.

Petitioner concedes that the instant tax "is virtually the same tax considered by this court in *Puget Sound Stevedoring Co. v. Tax Commission*, 302 U.S. 90 (1937)." (Pet. Br. pp. 4-5). We believe Petitioner will agree that the two taxes are *identical* in all respects material to the issues of this case. (*See* A. 4-7).

Petitioner characterizes the instant tax as a "general" business and occupation tax that "reaches virtually every form of business activity conducted in [the] state." (Pet. Br. pp. 4, 5). In fact, an occupation accounting for one of the larger portions of the state's gross product (farmers) is exempt. *See* Wash. Rev. Code § 82.04.330 (Appendix A); Appendix B to this brief. "The tax" on such businesses and occupations as have been selected to pay is actually a multitude of excises having varying bases and rates. The excises organized into two groups—one called a "business and occupation tax" (contained in Wash. Rev. Code ch. 82.04)

and the other called a "public utility tax" (contained in Wash. Rev. Code ch. 82.16). There are more than a dozen different rates. Railroads and express companies, for example, pay 360 times the rate applicable to wholesalers of grains and dried peas. *See* Wash. Rev. Code §§ 82.16.020, 82.04.260 (set forth in Appendix A to this brief). The influences of political considerations on the tax are apparent. (In that respect, see also Wash. Rev. Code § 82.04-.430(11), exempting interest received on residential mortgage obligations, the burden of which would otherwise fall on homeowners.)

SUMMARY OF ARGUMENT

The instant tax is imposed on the handling of imports and exports passing through a seaport jurisdiction—including those bound to and from inland states. A tax imposed at the point of passage by a seaport or other taxing jurisdiction controlling a gateway of commerce is uniquely capable of operating as a "transit fee" or toll burdening the citizens of less favorably situated states. Consumers of inland states are burdened because the fees will be included in the cost of the imports they consume. Producers in such states are burdened by the fees because their exports are made less competitive. The seaport or other gateway taxing jurisdiction can, without varying tax rates from those charged its own citizens, enjoy an enormous broadening of its tax base at the expense of non-residents—a fact which tends to remove the political restraints that normally operate on taxes.

The Constitutional draftsmen sought to combat a "transit fee" problem by adoption of the Import-Export Clause, which Petitioner concedes "contains a flat prohibition forbidding the states to impose imposts or duties on imports or

exports." This Court has held that duties include excises and has steadfastly resisted invitations to abridge the express prohibition of the Import-Export Clause. This Court has refused, for example, to limit the Clause's application to only those imposts or duties that are intended to discriminate against imports or exports. Further, this Court has adopted a pragmatic application of the Clause to prohibit certain excises on the importers and the carriers of imports and exports—where such taxes may have the same economic effect as a tax on the goods themselves.

In construing the Commerce Clause, this Court, like the Constitutional draftsmen of the Import-Export Clause, has evidenced a concern with the "tollgate syndrome". Movement of goods has been recognized as so fundamental to commerce that it has received special protection. The goods themselves are protected from tax while in the stream of commerce no matter how deeply a state may be penetrated. Further, this Court has recognized, as it has under the Import-Export Clause, that an excise imposed on a carrier can have the same economic effect as a tax imposed on the goods themselves. Interstate carriers, including water carriers, have been protected from carriage excises extending to the points where their carriage duties begin and end. By contrast, *intra*state carriers are not protected from excises. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), the case chiefly relied upon by Petitioner under the Commerce Clause, is the most recent of a long line of cases permitting an excise on the *intra*state carrier. Such an excise does not normally risk the tollgate syndrome because its burden tends to fall principally, if not exclusively, on local residents. (An excise on local transit in the destination state, for example, falls only on local consumers.) It is to be dis-

tinguished from an excise imposed on the passage of goods through a commerce gateway where the burden falls on citizens of other states. The century-long history of this Court's decisions under the Commerce Clause reflects a clear distinction between cases involving the *movement* of goods and the quite different cases involving interstate *transactions* (sales, advertising and commissions), such as *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938) (the case which first enunciated the principles relied on by Petitioner). The rhetoric from *transactional* cases should be applied to cases involving transit through commerce gateways with great care. All the cases decided by this Court under the Commerce Clause prior to 1938 (when *Western Live Stock* was decided) involved transportation or communication. There is a pragmatic wisdom in many of their holdings, as applied to excises imposed at commerce gateways, despite some language that may sound formalistic when applied to the transactional cases that began to appear in recent decades.

A tax on stevedoring is an ideal means of imposing the type of transit fee (imposed at the expense of less favorably situated states) feared by the Constitutional draftsmen and this Court. In the second stevedoring case, *Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S. 422 (1947), this Court struck down such a tax after having a decade to reflect on the principles enunciated in *Western Live Stock* and relied upon here by petitioner. This Court further struck down an analogous tax in *Michigan-Wisconsin Pipeline Co. v. Calvert*, 347 U.S. 157 (1954) after even more reflection. The stevedoring decisions not only protect against a tollgate syndrome, but comport with the lines that define the responsibility of water carriers in other fields of law, in-

cluding maritime common law, federal statutes and international agreements.

ARGUMENT

I. Introduction.

Petitioner repeatedly characterizes its basic theme as a triumph of a "pragmatic," "practical" or "economic" approach over approaches previously taken by this Court. (Pet. Br. pp. 16, 18, 30, 38).

Respondents embrace a "pragmatic" approach; but we add three refinements that we believe are fundamental to this case.

First, excises imposed on certain types of *movement* in commerce create the danger of what we will term here the "tollgate syndrome." By that term we mean that a seaport or other taxing jurisdiction positioned astride an avenue of commerce can impose "tolls" on residents of states less favorably situated. Without varying rates from those imposed on their own citizens, the favorably situated states can enjoy enormous increases in the tax base at the expense of increased burdens on non-citizens. Consumers in less favorably situated states are burdened because an excise imposed on any movement activity, whether it be importing, carriage, stevedoring or a like act, must be borne by those who consume the goods. Producers in such states can also be burdened because the "tolls" make their exports less competitive. The expansion of the tax base to non-citizens removes the political restraints that normally operate on taxes—hence the prospect of a "tollgate syndrome."

Second, the distinction between the Import-Export Clause (where pragmatism has, in fact, long been the rule)

and the Commerce Clause must be constantly kept in view.

Third, under the Commerce Clause, there is a distinction between cases involving *movement* and mere *transactional* cases like *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938). That case, which enunciated the doctrine relied upon by Petitioner, involved sales of magazines and advertising. The distinction between such cases and cases involving movement has long been implicit in the decisions of this Court. Soon after *Western Live Stock*, a leading scholar of the day speculated about the likely impact of the doctrine that decision had spawned.[1] Although he believed the impact could be far-reaching (and erroneously seemed to expect Mr. Justice Frankfurter to be in the vanguard of those leading the way to change), he did make note of an important fact that has escaped the attention of Petitioner:

> "May it be significant, however, that *all the recent opinions which gave rise to this practical approach involved taxes measured by gross receipts from sales, advertising, and commissions on sales?* Such taxes make evident at once the unfair competitive advantage which would result from exempting the interstate transaction from taxes borne by local transactions of the same character. *On the other hand, all the cases which prior to 1938 developed and applied the formal rule against taxing gross receipts from interstate commerce were concerned with receipts from transportation and communication.* Is this a mere chronological accident?" Lockhart, *Gross Receipts Taxes on Interstate Transportation and Communication*, 57 Harv. L. Rev. 40, 42 (1943) (emphasis supplied).

It is the "tollgate syndrome," peculiar to *movement* cases, that justifies the distinction. The wisdom of some 100 years of decisions protecting movement in commerce should not

1. Lockhart, *Gross Receipts Taxes on Interstate Transportation and Communication*, 57 Harv. L. Rev. 40, 42 (1943).

be lightly cast aside. The *transactional* cases, such as *Western Livestock*, may be recognized as a different genre and their rhetoric should be applied to movement cases only after careful thought about the economic consequences.

II. The Express Prohibition of the Import-Export Clause Precludes Imposing the Instant Tax If Either the Ordinary Meaning of the Clause or Its Purpose Are Given Effect.

A. *The Import-Export Clause Is a Flat Prohibition Against State Excises on Imports and Exports and Its Plain Meaning May Not Be Abridged by the Implied Qualification Advanced By Petitioner.*

The Import-Export Clause of the United States Constitution (art. I, § 10, cl. 2), provides in pertinent part:

> "No state shall, without the Consent of the Congress lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its Inspection Laws . . . ."

The flat prohibition of the Clause could hardly have been more plainly stated. Petitioner, in fact, acknowledges the "significant differences" between the Import-Export Clause and the implied prohibition of the Commerce Clause (U.S. Const. art. I, § 8, cl. 3):

> "The Commerce Clause is cast in terms of a grant of power to Congress to regulate foreign commerce. The Import-Export Clause, on the other hand, contains a flat prohibition forbidding the states to impose imposts or duties on imports or exports. See *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69 (1946)." (Pet. Br. pp. 32-33).

The impact of that flat prohibition (and the distinction between it and the lesser prohibition of the Commerce

Clause) was emphatically demonstrated in one of the two cases directly in point with the instant case. *See Joseph v. Carter & Weekes Stevedoring Co.*, 330 U.S. 422 (1947). In that case, a stevedoring tax was struck down under the Commerce Clause by a majority, but there were four dissents. However, two of the dissenters joined with the majority in striking down the tax under the Import-Export Clause, explaining:

> "[S]ince the Commerce Clause does not expressly forbid any tax, the Court has been free to balance local and national interests. . . . But the Import-Export Clause is written in terms which admit of no exception but the single one it contains. Accordingly a state tax might survive the tests of validity under the Commerce Clause and fail to survive the Import-Export Clause. For me the present tax is a good example." 330 U.S. at 445.

Despite Petitioner's seeming acknowledgment of the greater force of the Import-Export Clause prohibition (as compared to that of the Commerce Clause), Petitioner fails to deal with the distinction in its argument. Its argument under the Import-Export Clause is essentially a repetition of what it has said under the Commerce Clause. Petitioner argues as though any tax should be sustained under both clauses provided only there is "nexus," apportionment, and a lack of a designed discrimination.

This Court has already put such a notion to rest in a case cited with apparent approval by Petitioner, *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69 (1946). There this Court carefully explained the differences between the two clauses, and expressly rejected the suggestion that lack of designed discrimination will save a tax otherwise falling under the prohibition of the Import-Export Clause.

We quote at length because the point is fundamental to this case:

> "We do not pursue the inquiry as to the validity of the tax under the Commerce Clause. For we are of the view that whatever might be the result of that inquiry, the tax is unconstitutional under Article 1, § 10, Clause 2.
>
> "The two constitutional provisions, while related, are not coterminous. To be sure, a state tax has at times been held unconstitutional both under the Import-Export Clause and under the Commerce Clause. [Citations omitted.] But there are important differences between the two. The invalidity of one derives from the prohibition of taxation on the import or export; the validity of the other turns nowise on whether the article was, or had ever been, an import or export. [Citations omitted.] Moreover, the Commerce Clause is cast, not in terms of a prohibition against taxes, but in terms of a power on the part of Congress to regulate commerce. . . . [T]he law under the Commerce Clause has been fashioned by the Court in an effort 'to reconcile competing constitutional demands, that commerce between the states shall not be unduly impeded by state action, and that the power to lay taxes for the support of state government shall not be unduly curtailed.' That accommodation has been made by upholding taxes designed to make interstate commerce bear a fair share of the cost of the local government from which it receives benefits. . . .
>
> "*It seems clear that we cannot write any such qualifications into the Import-Export Clause.* It prohibits every State from laying 'any' tax on imports or exports without the consent of Congress. Only one exception is created—'except what may be absolutely necessary for executing its inspection Laws.' The fact of a single exception suggests that no other qualification of the absolute prohibition was intended. *It would entail a substantial revision of the Import-Export Clause to substitute for the prohibition against 'any' tax a prohibition against 'any discriminatory' tax* . . . But the two clauses, though complementary, serve

different ends. And the limitations of one cannot be read into the other.

"*It is suggested, however, that the history of the Import-Export Clause shows that it was designed to prevent discriminatory taxes* and not to preclude the levy of general taxes applicable alike to all goods . . . *The qualified interpretation urged upon us has therefore no substantial support in the history of the Import-Export Clause. Moreover, to infer qualifications does not comport with the standards for expounding the Constitution.* As stated by Chief Justice Marshall in Sturges v. Crowinshield, 4 Wheat. (US) 122, 202, 4 L ed 549, 550, 'it would be dangerous in the extreme to infer from extrinsic circumstances, that a case for which the words of an instrument expressly provide, shall be exempted from its operation.' For, as Chief Justice Taney said in Holmes v. Jennison, 14 Pet. (US) 540, 570, 571, 10 L ed 579.

> 'In expounding the Constitution of the United States, every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added. The many discussions which have taken place upon the construction of the Constitution have proved the correctness of this proposition; and shown the high talent, the caution, and the foresight of the illustrious men who framed it. Every word appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood. No word in the instrument, therefore, can be rejected as superfluous or unmeaning.'

We cannot, therefore, read the prohibition against 'any' tax on exports as containing an implied qualification." 329 U.S. at 75-78 (emphasis supplied).

That the prohibition is not limited to "discriminatory" imposts or duties is evident not only from the Constitutional language but is established by this Court's application of the Clause. For example, the tax struck down in *Richfield Oil Corp., supra,* was general and non-discriminatory, both

in form and operation.[2] It was imposed at a uniform rate on retailers generally.[3] There was no discrimination between sales made locally and those in foreign commerce. This Court recognized that the Constitution prohibits the application to imports and exports of even such a general, uniform excise:

> "*The prohibition contained in the Import-Export Clause against taxation on exports clearly involves more than a mere exemption from taxes laid specifically upon the exported goods themselves.* That is true of the constitutional prohibition against federal taxes on exports. United States v. Hvoslef, 237 US 1, 59 L ed 813, 35 S Ct 459, Ann Cas 1916A 286, supra. What was said there (p 13) is equally applicable here: 'If it meant no more than that, the obstructions to exportation which it was the purpose to prevent could readily be set up by legislation nominally conforming to the constitutional restriction but in effect overriding it.' [Citation omitted.]" 329 U.S. at 85 (emphasis supplied).

No more articulate statement of the imperative of the Import-Export Clause can be fashioned than this Court has already made. That it would be "dangerous in the extreme

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2. By contrast, Washington's B & O tax, although asserted by Petitioner to be general and nondiscriminatory, is neither general to all businesses and occupations, nor uniform in rate.

3. See ch. 36, § 1 [1941] Cal. Laws 533, 536, codified as Cal. Rev. & Tax Code §§ 6006, 6051, 6052. This Court accepted the characterization of the tax by the state supreme court:

> "The California Supreme Court held that the tax is an excise tax for the privilege of conducting a retail business measured by the gross receipts from sales; that it is not laid upon the consumer and does not become a tax on the sale or because of the sale. 27 Cal2d p 152, 163 P2d p 2.
>
> "That construction, being a matter of state law, is binding on us. But it is not determinative of the question whether the tax deprives the taxpayer of a federal right. That issue turns not on the characterization which the state has given the tax, but on its operation and effect." 329 U.S. at 83-84.

to infer from extrinsic circumstances"[4] a case for abridgment of the Clause's plain command is a principle already recognized by this Court.

B. *This Court Has Applied a Pragmatic Approach to Strike Down Attempts to Levy "Transit Fees" on Imports and Exports By Indirection.*

Petitioner repeatedly urges upon this Court, both under the Import-Export Clause and the Commerce Clause, a "pragmatic approach" that focuses on the "practical effects" of a tax. Respondents embrace that approach. So has this Court by its decisions under the Import-Export Clause.

Not only has this Court refused to abridge the plain language of the Import-Export Clause, but it has also pragmatically applied the Clause to strike down indirect violations of its principles.

As a means of giving the Import-Export Clause the scope that its principles require, this Court has consistently recognized that excises are among the "imposts or duties" proscribed.[5]

A landmark case under the Import-Export Clause is *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827). That case involved a tax arguably two steps removed from a

4. 329 U.S. at 77.

5. In *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976), chiefly relied upon by Petitioner on the Import-Export issue, this Court said: "'Duties' was a broader term embracing excises as well as customs duties . . . ." 423 U.S. at 291. Many prior decisions striking down excises under the Import-Export Clause confirm the inclusion of excises within the constitutional prohibition. See, e.g., *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827); *Almy v. California*, 65 U.S. (24 How.) 169 (1861); *Cook v. Pennsylvania*, 97 U.S. 213 (1878); *Crew Levick Co. v. Pennsylvania*, 245 U.S. 292 (1917); *Anglo-Chilean Nitrate Sales Corp. v. Alabama*, 288 U.S. 218 (1933); *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69 (1946); *Department of Revenue v. James Beam Distilling Co.*, 377 U.S. 341 (1964).

duty on imported goods—a tax imposed on the importer rather than the goods themselves, and on the privilege of selling rather than the privilege of importing. This Court, taking into account all three of the purposes of the Clause cited by Petitioners (in reliance on *Michelin Tire Corp. v. Wages, supra*), looked to the practical economic affects of the tax and reasoned:

> "If we quit this narrow view of the subject, and passing from the literal interpretation of the words, look to the objects of the prohibition, we find no reason for withdrawing the act under consideration from its operation.
>
> "[I]t is plain that the object would be as completely defeated by a power to tax the article in the hands of the importer the instant it was landed as by a power to tax it while entering the port. There is no difference, in effect, between a power to prohibit the sale of an article and a power to prohibit its introduction into the country. The one would be a necessary consequence of the other." 25 U.S. at 438-39.
>
> . . . .
>
> "It is impossible to conceal from ourselves that this is varying the form without varying the substance. It is treating a prohibition which is general as if it were confined to a particular mode of doing the forbidden thing. . . ." 25 U.S. at 444.

In *Almy v. California*, 65 U.S. 169 (1861) this Court struck down an excise that was arguably less directly upon imports than that in *Brown v. Maryland*. The excise in *Almy* was not imposed upon the imported goods or even the importer, but upon the bill of lading issued by the carrier. This Court explained:

> "But a tax or duty on a bill of lading, although differing in form from a duty on the article shipped, is in substance the same thing; . . . A bill of lading, therefore, or some equivalent instrument of writing, is in-

variably associated with every cargo of merchandise exported to a foreign country, and consequently a duty upon that is, in substance and effect, a duty on the article exported." 65 U.S. at 174.

Other taxes also not imposed directly on the imported goods, have similarly been struck down where their effect was tantamount to a tax on the imported goods. Several examples were recited in the *Richfield Oil Corp.* decision:

> "Thus a *federal stamp tax on a foreign bill of lading is a tax on exports, since it is the equivalent of a direct tax on the articles* included in the bill of lading. Fairbank v. United States, 181 US 283, 45 L ed 862, 21 S Ct. 648. *The same is true of federal stamp taxes on charter parties* made exclusively for the carriage of cargo in foreign commerce, United States v. Hvoslef, 237 US 1, 17 . . . *For a tax on those charter parties is 'in substance of a tax on the exportation; and a tax on the exportation is a tax on the exports. The same is likewise true of federal stamp taxes on policies insuring exports* against maritime risks. Thames & M. M. Ins. Co. v. United States, 237 US 19, 59 L ed 821, 35 S Ct 496, Ann Cas 1915D 1087. The Court stated, p 27:
>
> > 'The rise in rates for insurance as immediately affects exporting as an increase in freight rates, *and the taxation of policies insuring cargoes during their transit to foreign ports is as much a burden on exporting as if it were laid on the charter parties, the bills of lading, or the goods themselves. . . .'"
>
> 329 U.S. at 80 (emphasis supplied).

The *Fairbank, Hvoslef* and *Thames* cases cited in *Richfield* involved *federal* taxes struck down by this Court under U.S. Const., art. I, § 9, cl. 5. That constitutional provision—prohibiting federal taxes or duties on exports—is closely analogous to the Import-Export Clause. As the Court observed in *Brown v. Maryland*:

> "The states are forbidden to lay a duty on exports, and the United States are forbidden to lay a tax or duty on articles exported from any state. *There is some diversity in language, but none is perceivable in the act which is prohibited. . . .*" 25 U.S. at 445 (emphasis supplied).

The Court recognized in *Hvoslef* that:

> "This constitutional freedom however, plainly involves *more than mere exemption from taxes or duties which are laid specifically upon the goods themselves.* If it meant no more than that, the obstructions to exportation which it was the purpose to prevent could readily be set up by legislation nominally conforming to the constitutional restriction, but in effect overriding it. It was the clear intent of the framers of the Constitution that 'the *process of exporting* the products of a state, the goods, chattels, and property of the people of the several states, should not be obstructed or hindered by any burden of taxation. Miller, Const. p. 592." 237 U.S. at 13 (emphasis supplied).

In *Fairbank*, the Court endorsed "the great principle that what cannot be done directly because of constitutional restriction cannot be acomplished indirectly by legislation which accomplishes the same result." 181 U.S. at 294. The Court also stated and applied a related principle:

> "[N]o legislation can be tolerated which, although it may not conflict with the letter, destroys the spirit and purpose of the restriction imposed. If, for instance, Congress may place a stamp duty of 10 cents on bills of lading on goods to be exported, it is because it has power to do so; and if it has power to impose this amount of stamp duty it has like power to impose any sum in the way of stamp duty which it sees fit. And it needs but a moment's reflection to show that thereby it can as effectually place a burden upon exports as though it placed a tax directly upon the articles exported. It can, for the purposes of revenue, receive just as much as though it placed a duty directly upon the articles, and it can just as fully restrict the free exportation which was one of the purposes of the Constitution." 181 U.S. at 290-91.

The same dangers inhere, we submit, in the instant tax on stevedores handling imports and exports.

Appellant places its reliance on *Michelin Tire Corp. v. Wages, supra*, a recent property tax case decided by this Court. In *Michelin*, 423 U.S. at 290, this Court recognized that the Clause prohibits "transit fees," citing the *License Cases*, 46 U.S. (5 How.) 504 (1847). The *License Cases*, in fact, provide an articulate distinction between the tax in *Michelin* (a *property* tax levied on the mass of goods in the state), and a tax on the thing imported, while it remains a part of commerce (such as the excises that have been struck down by this Court under the Import-Export Clause):[6]

> "Undoubtedly a State may impose a tax upon its citizens in proportion to the amount they are respectively worth; and the importing merchant is liable to this assessment like any other citizen, and is chargeable according to the amount of his property, whether it consists of money engaged in trade, or of imported goods which he proposes to sell, or any other property of which he is the owner. But a tax of this description stands upon a very different footing from the tax on the thing imported, while it remains a part of foreign commerce, and is not introduced into the general mass of property in the State. . . ." 46 U.S. at 576.

6. In the *License Cases*, six Justices produced nine separate opinions, but appeared to reach a consensus that the goods in all three cases were taxable because they were no longer imports, having been incorporated into the mass of property in the state. Several Justices also grounded their conclusion on the police power of states because of the type of goods involved ("ardent spirits"). The case of *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851), relied on by Petitioner as though it were an ordinary tax case (Pet. Br. pp. 36-37), also involved an exercise of police power. A statutory penalty was imposed on a vessel master for failure to observe a safety requirement that a pilot be aboard.

C. *The Instant Tax Is a Classic Example of a Toll or "Transit Fee" Prohibited By the Import-Export Clause, Which Falls Upon Non-Citizens of the State and Lends Itself to Even Further Abuse.*

Analysis will show, we believe, that Washington's tax on stevedores operates as a "toll" on the citizens of inland states. Citizens of Washington provide the "base" of the tax only to the extent that goods originate in or are destined for that state. The rest of the tax base is provided by non-citizens. Further, that existing abuse is potentially expandable—by an increase in the tax rate. We will elaborate on this point after first reviewing what Petitioner said in defense of the tax under the Import-Export Clause.

When reduced to its essentials, Petitioner's argument under the Import-Export Clause is a repetition of its argument under the Commerce Clause (dealing with nexus, apportionment and lack of designed discrimination), plus a bald assertion that the instant tax is not a "transit fee." (Pet. Br. pp. 40-41). Petitioner's argument against a "transit fee" characterization of the instant tax is supported by circular reasoning:

> "Stated otherwise, is Washington's B&O Tax a mere 'transit fee'? Still again, we think not. The tax in question is nondiscriminatory and is not directed at imports or exports as such. It is apportioned exactly to those activities which take place in the State of Washington and does not reach activities taking place elsewhere. . . ." (Pet. Br. p. 41).

Thus, although purporting to ask and answer a *new* question, Petitioner's "transit fee" argument circles back to where it began, i.e., Petitioner's Commerce Clause argument. Petitioner, in short, asserts that the instant tax is not a "transit fee"—despite being imposed on the moving

of goods through a seaport—because it is apportioned and nondiscriminatory. Again, the *License Cases, supra*, articulate the flaw in Petitioner's reasoning:

> "A tax in any shape upon imports is a tax on the consumer, by enhancing the price of the commodity. And if a State is permitted to levy it in any form, *it will put it in the power of a maritime importing State to raise a revenue for the support of its own government from citizens of other States, as certainly and effectually as if the tax was laid openly and without disguise as a duty on imports.* Such a power in a State would defeat one of the principal objects of forming and adopting the Constitution. *It cannot be done directly,* in the shape of a duty on imports, for that is expressly prohibited. *And as it cannot be done directly, it could hardly be a just and sound construction of the Constitution which would enable a State to accomplish precisely the same thing under another name, and in a different form.*" 46 U.S. at 576 (emphasis supplied).

The foregoing statement of this Court focuses the vice of the instant tax, considered in the light of the Import-Export Clause purposes. In a word, the tax operates as a "toll" (or "transit fee"). *Even assuming a rate that is uniform throughout the taxing jurisdiction,* it is apparent that a seaport or other gateway of commerce can broaden its tax base at the expense of non-citizens. Seaport jurisdictions hardly need the assistance of economists to appreciate that the burden of a tax on their own citizens is more than compensated for when the base of the tax is broadened by forcing non-citizens to bear it. That was precisely what the Constitutional draftsmen sought to prevent. As this Court recognized in *Michelin*:

> "An evil to be prevented by the Import-Export Clause was the levying of taxes which could only be imposed because of the peculiar geographical situation of certain States that enabled them to single out goods destined for other States." 423 U.S. at 289-90.

By their nature, imports and exports passing through seaports involve stevedores. Whatever may be the intent of Petitioner's proposed new rule taxing stevedores, it has the economic affect of "singling out" water-carried imports and exports.

In short, a tax on the movement of imports and exports through a seaport is uniquely susceptible to the imposition of a "toll" on citizens of states less favorably situated. A uniform rate of tax spread among several states or a multitude of states so broadens the tax base that normal political restraints are apt to be lost or diluted. The Constitutional fathers saw that threat and dealt with it in unmistakable language. It would be dangerous doctrine for this Court to depart from its earlier positions and limit the scope of the Import-Export Clause, merely because a state alleges that it intended no discrimination.

Further, it is meaningless for Petitioner to speak, in this context, of apportionment or nondiscrimination. We have already noted that the base of the tax (gross receipts of the stevedores) is expanded by reason of goods handled that are produced by, or destined for, citizens of inland states. Additionally, because the tax is a multiple of its rate times its base, account must be taken of the infinite flexibility allowed the seaport state in fixing the rate. Petitioner speaks of the instant tax as a "general" tax, yet one of the largest groups of producers of gross product in the state (farmers) do not pay it. *See* Wash. Rev. Code § 82.04.330 (Appendix A); Appendix B to this brief. Among those who do pay, there is a wide variance in rates; railroads and express companies, for example, paying 360 times the rate applicable to wholesalers of grains and dried peas. *See* Wash. Rev. Code §§ 82.16.020, 82.04.230-.290.

Finally, we think it fair to say that Petitioner, with its emphasis on the "pragmatic approach to the Import-Export Clause" over the "direct-indirect" inquiry, will not seriously argue that the instant tax is not a tax on imports and exports—merely because it is not imposed directly on the importer or exporter. It would be truly a paradox if Petitioner, which advocates jettisoning the "direct-indirect" approach (under both the Import-Export Clause and the Commerce Clause), should resort to that approach in defense against the prohibition of the Import-Export Clause. Candor requires Petitioner to concede the validity of this Court's conclusion in *Brown v. Maryland, supra*, that a tax on the importer is tantamount to a tax on the imported goods. A like candor requires an admission that a tax on the *mover* of the goods is also tantamount to a tax on the goods themselves.[7]

A pragmatic view of the tax on stevedores should further yield a concession by Petitioner that the performance of stevedoring "wholly within the territorial limits of Washington" (Pet. Br. p. 4) misses the "tollgate" point. As this Court pointed out in *Brown v. Maryland*:

> "[I]t is plain that the object would be as completely defeated by a power to tax the article in the hands of the importer the instant it was landed as by a power to tax it while entering the port." 25 U.S. at 439.

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7. The tax this Court struck down in *Almy v. California*, 65 U.S. 169 (1861), was an excise on the carrier. There is an indication in Petitioner's brief, however, that it has been sorely tempted to employ the "direct-indirect inquiry" in defense of its position under the Import-Export Clause. Petitioner admits that Wash. Rev. Code § 82.04.500 makes the stevedore tax an item of "overhead." (Pet. Br. p. 23). Incredibly, however, Petitioner denies that the tax will be passed on by the stevedore to the carrier and importer. As a matter of elementary business economics, any business must ask its customers to bear its costs as well as provide an acceptable return on invested capital.

Tollgates typically lie within the boundaries of the taxing jurisdiction, but that does not mitigate their potential for harm. The instant tax cannot be distinguished, if one is concerned with practical or economic affects, from the taxes struck down by this court because laid directly on the importer.

In summary, this Court should not adopt the dangerous precedent of limiting the express prohibition of the Import-Export Clause to save a tax which would operate—if applied to stevedores—to expand its base to non-citizens of the state. The plain language of the Constitutional draftsmen should not be abridged—particularly under circumstances where this Court is unable to conclude with certainty that impediments to commerce feared by those draftsmen cannot occur.

III. The Existing Protection Afforded Movement of Goods and Persons Under the Commerce Clause Should Be Continued Because Apportionment of Taxes and the Rule Against Discrimination Do Not Provide Adequate Safeguards.

A. *Over 100 Years of Protection Afforded Movement of Goods and Persons Under the Commerce Clause Should Be Continued.*

The "toll gate syndrome" that the Constitutional draftsmen combated by the express prohibition of the Import-Export Clause has motivated this Court over the past century in construing the Commerce Clause. That syndrome is principally, if not exclusively, dangerous in cases involving *movement* of commerce.

A major defect of Petitioner's position is its failure to ob-

serve the difference in the decisions of this Court under the Commerce Clause between *movement* cases and *non-movement* cases.

Beginning with *Case of The State Freight Tax*, 82 U.S. (15 Wall.) 232 (1873), this Court has recognized that the movement of goods is fundamental to commerce. Movement has, therefore, received special protection.

Petitioner must concede that goods moving in interstate commerce enjoy protection from state property taxation—from the commencement of the journey to its end—as long as there is no unnecessary interruption or delay in the journey. *Champlain Realty Co. v. Brattleboro*, 260 U.S. 366 (1922); *Hughes Bros. Timber Co. v. Minnesota*, 272 U.S. 469 (1926); *Carson Petroleum Co. v. Vial*, 279 U.S. 95 (1929); *Minnesota v. Blasius*, 290 U.S. 1 (1933). The protection extends for the entire length of the journey no matter how deeply the state may be penetrated or how many carriers are involved.

Recognizing that an excise on the *mover* of the goods can be tantamount to a tax on the goods, *Brown v. Maryland, supra*, this Court supplemented protection of the goods with protection of carriers from excises on movement activity.

The protection of movement began with the *Case of The State Freight Tax, supra*, where the attempt was to tax the activity of moving freight in interstate commerce. The tax was struck down. The later case of *Philadelphia & Southern Steamship Co. v. Pennsylvania*, 122 U.S. 326 (1887), became the leading case condemning state taxes on gross receipts from that activity. Other cases in the line include

Fargo v. Michigan, 121 U.S. 230 (1887); *Galveston, Harrisburg & San Antonio Railway v. Texas*, 210 U.S. 217 (1908); *Meyer v. Wells Fargo & Co.*, 223 U.S. 298 (1912). The protection from excises on transport has continued to this day. *Michigan-Wisconsin Pipeline Co. v. Calvert*, 347 U.S. 157 (1954). It is because of this line of decisions that goods (and persons) can cross a continent without paying an excise to each state along the way.

The protection of interstate and foreign carriers from excises extends as far as their responsibility for the carriage goes. *Puget Sound Stevedoring Co. v. Tax Commission*, 302 U.S. 90 (1937); *Joseph v. Carter & Weekes Co.*, 330 U.S. 422 (1947); *Michigan-Wisconsin Pipeline Co. v. Calvert, supra*. Further, this court, in *Puget Sound Stevedoring Co.*, refused to draw a distinction between the interstate or foreign carrier loading and unloading through its own employees and a carrier acting through an independent contractor. Thus, where the interstate carrier in *Puget Sound* acted through stevedores in loading and unloading, this Court said:

> "No one would deny that the crew would be engaged in interstate or foreign commerce if busied in loading or unloading an interstate or foreign vessel. Cf. Baltimore & O. S. W. R. Co. v. Burtch, 263 U.S. 540, 68 L. ed. 433, 44 S. Ct. 165, 24 N.C.C.A. 42. The longshoreman busied in the same task bears the same relation as the crew to the commerce that he serves. Indeed, for the purposes of the Merchant Marine Act ([June 5, 1920] 41 Stat. at L. 988, 1007, chap. 250, 46 U.S.C.A. § 861), a stevedore is a 'seaman.'" 302 U.S. at 92.

Again, we would not expect Petitioner to disagree. It would surely be a return to the "direct-indirect" approach

that Petitioner condemns if a distinction were to be made between a carrier acting through its employees and one acting through independent contractors. In fact, Petitioner's brief makes clear that Petitioner makes no distinction between the carrier and its arm, the stevedore. Petitioner asserts the right under both the Commerce Clause and the Import-Export Clause to tax *anyone* "engaging in the business of transporting goods." (Pet. Br. pp. 13, 32).

The protection of the *mover* of goods, however, has been somewhat more limited geographically than the protection afforded the goods themselves. This Court has permitted an excise to be imposed on the *intrastate* carrier which links up with the interstate or foreign carrier to carry goods *locally*. In fact, in the *Puget Sound* case this Court expressly distinguished such a case as follows:

> "The situation thus presented has no resemblance to that considered in New York ex rel. Pennsylvania R. Co. v. Knight, 192 U.S. 21, 26, 48 L. ed. 325, 327, 24 S. Ct. 202, where an interstate railroad furnished its passengers with taxicab service to and from its terminus, the service being 'contracted and paid for independently of any contract or payment for strictly interstate transportation.'" 302 U.S. 93-94.

This Court has thereafter consistently made the same distinction. *Interstate Oil Pipeline Co. v. Stone*, 337 U.S. 662 (1949); *Canton Railroad Co. v. Rogan*, 340 U.S. 511 (1951); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). In *Interstate Oil* an intrastate railroad linking up with an interstate pipeline was subject to tax. In *Canton Railroad*, a local railroad operating entirely within the city of Baltimore and linking up with ocean and rail carriers was taxed. The same result occurred recently in *Complete Auto Transit* involving an intrastate automobile carrier.[8] Allowing excises on purely local carriers can be justified on the "pragmatic" grounds that Petitioner advocates. Such taxes do not afford the opportunity for fastening a "toll" on non-residents that excises on interstate carriers do. The tollgate syndrome does not operate because local producers or consumers bear the tax burdens laid on transit from one local point to another.[9]

Petitioner places its principal reliance upon *Complete Auto Transit*. Unquestionably, the language of that case, which includes the overruling of *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602 (1951), is sweeping enough to provide Petitioner encouragement. On its facts, however, *Complete Auto Transit* simply follows a long line of prece-

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8. See also *Central Greyhound Lines v. Mealey*, 334 U.S. 653 (1948). A tax on a journey beginning and ending in New York, and hence local, was struck down; but only because 43% of the journey was through Pennsylvania and New Jersey and the tax failed to exclude that portion of the journey from its base.

9. An excise imposed on the passage of goods from one point to another in the destination state falls on the consumer in that state. A like excise imposed between local points of the state of origin tends to be borne by the producers of that state whose goods become less competitive. Such local excises are in contrast to the excise imposed by a gateway jurisdiction on "through" passage because the base or measure of the tax is enlarged at the expense of non-residents. The tollgate syndrome may have prompted the reservation of opinion by Justices Jackson and Frankfurter in *Canton Railroad*. There the "local" carrier was the connecting link between ocean carriers and trunk-line rail carriers. While the case at first blush seems to fall within the rule permitting excises on local carriers, the linking by the Canton Railroad of foreign and interstate carriers may have justified the concern of the two Justices. A similar concern might be expressed for the holding of *Railway Express Agency v. Virginia*, 358 U.S. 434 (1959), although that decision was rationalized as an "in lieu of property tax" case consistent with a long line of decisions. The cases of *Memphis Gas Co. v. Stone*, 335 U.S. 80 (1948), and *Colonial Pipeline Co. v. Traigle*, 421 U.S. 100 (1975), are saved from tollgate abuse by reason of the taxes involved there having been measured by capital employed in the state. Such taxes are subject to local political restraints similar to those operating on property taxes.

dent from this Court. (The tax involved in *Spector* might have been viewed as an income tax in substance, ineptly labeled as an excise on the privilege of doing an interstate carriage business.)

Because, as this Court recognized in *Brown v. Maryland, supra,* an excise on the mover of goods has the operative effect of a tax on the goods themselves, the protection against such excises must be continued if the protection of the goods is to survive.

B. *Apportionment Is Not an Adequate Alternative to the Protection Afforded Movement.*

Appellant appears to contend for a decision that would sweep away all the aforementioned precedent. We emphasize "all" because Petitioner contends that any tax on interstate movement of goods should be sustained provided only that it has "nexus," is not susceptible of multiple imposition and not designed to discriminate against interstate or foreign commerce. (Pet. Br. p. 13). To make that statement is tantamount to saying that any nondiscriminatory tax can be saved by apportionment. It is apportionment that would presumably allow, without "multiple imposition," the taxing of a coast-to-coast truck, train, bus or airplane journey by each of the myriads of taxing jurisdictions through which passage is made.

Petitioner neglects to note, however, that apportionment is a doctrine born of *non-movement* cases. *Western Live Stock* is generally cited as its genesis. *Western Live Stock* was a *transactional,* not a movement case. It involved the publishing and sale of a magazine. We refer again to the fact that all decisions invoking the *Western Live Stock*

doctrine have involved taxes measured by gross receipts from sales, advertising and commissions on sales; whereas, all cases which applied the so-called "formal" rule were concerned with receipts from transportation and communication.[10] Despite their "formal" language, many of the traditional transportation cases reflected a pragmatic concern for the threats to commerce that we attempt to describe in this section of our brief.

In short, the important distinction in this case may not be between "formalism" and "pragmatism," but rather between movement and transactional cases. It is taxes on movement which may, depending on the circumstances of the case, create a risk of a toll gate syndrome.

A related consideration is that transactional cases readily lend themselves to relatively simple apportionment. For example, in the typical sale there are only two points of contact, i.e., the point of origin and the place of the market. Apportionment might readily be made, therefore, between the state of origin and the state providing the market, so that the taxpayer would have to deal with only two taxing jurisdictions. In fact, however, this Court has elected to permit only *one* of the two states involved to tax.[11] The state of the *market* may tax.[12] The state of origin may

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10. Lockhart, *supra,* note 1. The fact that the transportation cases arose chronologically earlier than the transactional cases may create an impression that the former are outdated and superceded by the latter; whereas in fact their differences reflect the different problems they present.

11. *See* concurring opinion of Mr. Justice Rutledge in *Freeman v. Hewit,* 329 U.S. 249, 281-82 (1946).

12. *McLeod v. J. E. Dilworth Co.,* 322 U.S. 327 (1944); *Norton Co. v. Dept. of Revenue,* 340 U.S. 534 (1951); *Field Enterprises v. Washington,* 352 U.S. 806 (1956); *General Motors Corp. v. Washington,* 377 U.S. 436 (1964); *Standard Pressed Steel Co. v. Washington,* 419 U.S. 560 (1975).

not tax the interstate sale.[13]

It requires little imagination to perceive the burdens that are likely to result from sweeping away the protection this court has thus far afforded interstate and foreign movement. A journey from Seattle to Miami by truck, train, bus or airplane[14] may be exposed to the taxing jurisdiction of up to 10 states and a myriad of local jurisdictions. Their legislatures would hardly need economists at their sides to perceive that apportioned excises on the journey would fall on non-citizens of the taxing jurisdictions.

In short, to require apportionment and nondiscrimination in movement cases does not prevent states positioned astride commerce "gateways" from broadening their tax bases at the expense of non-citizens. By taking advantage of their geographic locations, such states can practice a form of discrimination too subtle for courts to deal with under existing precedent.[15]

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13. *J. D. Adams Mfg. Co. v. Storen*, 304 U.S. 307 (1938); *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434 (1939); *Freeman v. Hewit*, *supra* note 11. The state of origin may, however, tax the act of extraction or production. *American Mfg. Co. v. St. Louis*, 250 U.S. 459 (1919) (manufacturing); *Hope Natural Gas Co. v. Hall*, 274 U.S. 284 (1927) (production of natural gas); *Oliver Iron Mining Co. v. Lord*, 262 U.S. 172 (1923) (mining). These cases, together with those allowing the market state to tax the interstate sale, produce the same overall effect as apportionment. The producer-seller may have to deal with two (but not more than two) states in an interstate transaction.

14. Taxing of journeys by airplane conceivably could be limited to jurisdictions where landings occurred; but that would require a tenuous distinction between traveling over ground and passing through a taxing jurisdiction's air space.

15. Soon after this Court approved a head tax on interstate airline passengers (on the basis that the proceeds were limited to the development and maintenance of the airport facility involved), *Airport Authority v. Delta Airlines*, 405 U.S. 707 (1972), a Senate Committee identified at least 31 jurisdictions that had rushed to enact various forms of head taxes. S. Rep. No. 12, 93d Cong., 1st Sess. (1973). The committee commented:

> "While this decision has invited state and local governments to enact head taxes or fees on air travelers, the court decision does not provide adequate safeguards to prevent undue or discriminatory taxation."

The tax in *Delta Airlines* avoided the "toll gate syndrome" by limiting its proceeds to development and maintenance of the airport facility—thus benefiting users of the airport in proportion to their use regardless of their place of residence. Congress evidently feared that other taxes would not provide the same proportional benefits. See, in this regard part III C, *infra*, discussing the limited utility of the rule against discrimination.

Further, the administrative burden of dealing with so many jurisdictions in movement cases may, alone, be a sufficient reason to sustain the protection heretofore afforded movement in commerce and to distinguish transactional cases.

Finally, in the absence of Congressional action, one may confidently expect differing rules of apportionment, with resulting complexities in compliance and the probability of overlapping taxes. Neither this court not the state courts have the resources to provide the refinement necessary to avoid such problems. The words of Mr. Justice Frankfurter in *Freeman v. Hewit*, *supra*, directed to this point, are pertinent:

> "Courts are not possessed of instruments of determination so delicate as to enable them to weigh the various factors in a complicated economic setting which, as to an isolated application of a State tax, might mitigate the obvious burden generally created by a direct tax on commerce." 329 U.S. at 256.

C. *The Rule Against Discrimination Is Not an Adequate Alternative to Protection of Movement in Commerce.*

The rule against discrimination is not adequate for the task of protecting commerce because of the nature of the

excise. It is the most potent and dangerous weapon in the tax collector's arsenal. It can attach to activities of all kinds. The excise lacks the built-in political restraints that apply to property and income taxes which, if not required to be uniform, at least tend to be general with respect to individuals or corporations that populate the taxing jurisdiction.

The lack of built-in retraints on the excise are particularly dangerous when imposed at a gateway of commerce. The versatility of the excise makes it, in practice, virtually immune to charges of discrimination. Washington, for axample, has more than a dozen different tax rates for the privilege of doing business, with the top brackets paying 360 times the rate of the bottom. Wash. Rev. Code §§ 82.04.230-.290, RCW 82.16.020. This Court, in *Magnano Co. v. Hamilton*, 292 U.S. 40 (1934), permitted Washington to tax butter substitutes, reasoning that the obvious differences between butter and oleo margarine were enough to support separate tax classifications. Following this Court's lead, the Washington court has explained, "[T]here is no constitutional limitation upon the selection by the legislature of the subjects for excise tax so long as there is any reasonable basis for the classification whatsoever." *Gruen v. State Tax Commissioner*, 35 Wn.2d 1, 32, 211 P.2d 651, 669 (1949). More recently a tax on the operation of such recreational activities as golf, skating, skiing, pool and billiards has been approved while bowling was exempted. *Hemphill v. Tax Commissioner*, 65 Wn.2d 889, 400 P.2d 297 (1965). Even in interstate commerce the rule against discrimination has been effective mainly to curb legislation aimed at out-of-state drummers (*see, e.g., Robbins v. Taxing District of Shelby County, Tennessee*, 120 U.S. 489 (1887); *Nippert v. Richmond*, 327 U.S. 416 (1946)); and

has not necessarily been effective even for that purpose. *See Dunbar-Stanley Studios, Inc. v. Alabama*, 393 U.S. 537 (1969), where this Court upheld a tax on transient photographers.

In short, the rule against discrimination is too crude a tool for the task of coping with the subtleties of the excise.

D. *A Radical Change of Protection in the Field of Movement in Commerce Requires Congressional Rather Than Court Action.*

Taxation of movement in interstate commerce conditioned only on "nexus," apportionment and nondiscrimination would not only sweep away the two stevedoring precedents (the second set by this Court after a ten year interval for reflection), but would arguably call into question a myriad of other decisions as well. Certainly the case of *Michigan-Wisconsin Pipeline Co. v. Calvert, supra*, would be in jeopardy as well as earlier cases in that line of authority.[16]

Further, the reasoning of *Brown v. Maryland, supra*, that restrictions on taxation of the movers of goods is as necessary for protection of goods as restrictions on taxation of the goods themselves, suggests an even more radical sweeping away of precedent. If protection from excises on the transporters is eliminated, thus permitting states to reach the goods in that manner, there might be little utility remaining in the cases protecting goods moving in the stream

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16. For example, *Case of The State Freight Tax*, 82 U.S. (15 Wall.) 232 (1873); *Philadelphia & Southern Steamship Co. v. Pennsylvania*, 122 U.S. 326 (1887); *Fargo v. Michigan*, 121 U.S. 230 (1887); *Galveston, H & S. A. Ry. v. Texas*, 210 U.S. 217 (1908); *Meyer v. Wells Fargo & Co.*, 223 U.S. 298 (1912).

of commerce. By implication, these cases too might be swept away.[17]

Admittedly, the problem of protecting commerce in a complex economy, with the competing needs of commerce and the demands of states for revenue, has been a vexing one. The resulting mosaic of decisions has sometimes appeared as a "tangled underbrush" even to this Court (see Mr. Justice Clark's opinion in *Northwest States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959)); and has been criticized by a chorus to which Petitioner adds its voice by attacking the stevedore cases. However, Petitioner may not share the insight of the more astute critics—that the "tangle" is in large part attributable to the many and complex interrelationships among the Court's holdings which comprise this large body of law; that a piece-meal approach is likely to thicken the "tangle" or to wreak havoc with the highly integrated whole, by creating new uncertainties as to possible "new trends" in judicial thinking. Informed critics have long thought that improvement upon the body of law established by this Court should come from comprehensive Congressional consideration. *See McCarroll v. Dixie Greyhound Lines, Inc.*, 309 U.S. 176, 188-89 (1940) (Black, Douglas and Frankfurter, JJ., dissenting); *Northwest States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959) (Frankfurter, J., dissenting):

> "The problem calls for solution by devising a congressional policy. Congress alone can provide for a full and thorough canvassing of the multitudinous and intricate factors which compose the problem of the taxing freedom of the States and the needed limits on such state power. Congressional committees can make studies and give the claims of the individual States adequate hearing before the ultimate legislative formulation of policy is made by the representatives of all the States. The solution to these problems ought not to rest on the self-serving determination of the States of what they are entitled to out of the Nation's resources. Congress alone can formulate policies founded upon economic realities, perhaps to be applied to the myriad situation involved by a properly constituted and duly informed administrative agency." 358 U.S. at 476-77.

17. For example, *Champlain Realty Co. v. Brattleboro*, 260 U.S. 366 (1922); *Hughes Bros. Timber Co. v. Minnesota*, 272 U.S. 469 (1926); *Carson Petroleum Co. v. Vial*, 279 U.S. 95 (1929); *Minnesota v. Blasius*, 290 U.S. 1 (1933).

After more than a century of inactivity with respect to state taxation of interstate commerce, Congress responded within seven months of Justice Clark's comment in *Northwestern Cement, supra*, by passing Public Law 86-272. That law contains stopgap provisions restricting the states' power to tax income from the sale of goods in interstate commerce. *See* 15 U.S.C.A. § 381-84. More importantly in the present context, the law also provides:

> "Sec. 201. The Committee on the Judiciary of the House of Representatives and the Committee on Finance of the United States Senate, acting separately or jointly, or both, or any duly authorized subcommittees thereof, shall make full and complete studies of all matters pertaining to the taxation of interstate commerce . . . ." Pub.L. No. 86-272 (Sept. 14, 1959), 73 Stat. 555, as amended by Pub.L. No. 87-17 (Apr. 7, 1961), 75 Stat. 41; Pub.L. No.87-435 (Apr. 21, 1962), 76 Stat. 55.

The designated Congressional committees, striving to fulfill their mandate, have completed studies, reported findings

and conclusions,[18] held hearings,[19] and proposed legislation.[20] Although the chronicles of the Committees' efforts are steadfastly optimistic that a comprehensive legislative solution can be effected,[21] the task is not yet completed.

Thus the mosaic of law created by this Court over the period of a hundred years has been easy to criticize, but is proving difficult to improve. Even Mr. Justice Clark observed in *Northwest States Portland Cement Co., supra*, "From the quagmire there emerged . . . some firm peaks of decision which remain unquestioned." 358 U.S. at 458. Those peaks of decision should not, we suggest, be radically altered except by Congressional action.

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18. *See, e.g.*, H. R. Rep. No. 1480, 89th Cong., 1st Sess. (1965); H. R. Rep. No. 565, 89th Cong., 1st Sess. (1965); H. R. Rep. No. 952, 89th Cong., 1st Sess. (1965).

19. *See, e.g.*, Hearings Before the Special Subcomm. on State Taxation of Interstate Commerce of the House Comm. on the Judiciary, 87th Cong., 1st Sess., Ser. 20 (1961); Hearings Before the Special Subcomm. on State Taxation of Interstate Commerce of the House Comm. on the Judiciary, 87th Cong., 2d Sess., Ser. 20a(1962); Hearings Before the Subcomm. on State Taxation of Interstate Commerce of the Senate Comm. on Finance, 93d Cong., 1st Sess. (1973); Hearings on H. R. 2096 Before the Subcomm. on State Taxation of Interstate Commerce of the Senate Comm. on Finance, 93d Cong., 2d Sess. (1974).

20. *See, e.g.*, H. R. 11798, 89th Cong., 1st Sess. (1965); H. R. 16491, 89th Cong., 2d Sess. (1966); H. R. 2158, 90th Cong., 1st Sess. (1967); H. R. 2179, 91st Cong., 1st Sess. (1969); H. R. 7906, 91st Cong., 1st Sess. (1969); S. 916, 91st Cong., 1st Sess. (1969); S. 317, 92d Cong., 1st Sess. (1971); S. 1210, 92d Cong., 1st Sess. (1971); H. R. 1538, 92d Cong., 2d Sess. (1972); S. 3333, 92d Cong., 2d Sess. (1972); S. 4080, 92d Cong., 2d Sess. (1972); H. R. 977, 93d Cong., 1st Sess. (1973); S. 1245, 93d Cong., 1st Sess. (1973); S. 2092, 93d Cong., 1st Sess. (1973); S. 282, 93d Cong., 1st Sess. (1973).

21. *See, e.g.*, the remarks of then Senator Mondale, Chairman, in Hearings Before the Subcomm. on State Taxation of Interstate Commerce of the Senate Comm. on Finance, 93d Cong., 1st Sess. 1-2 (1973).

IV. The Policy Reasons Underlying a Need For Continued Protection of Movement in Interstate and Foreign Commerce Apply to Stevedoring.

Petitioner has used the following language to express what it asks of this Court:

> "The State asks nothing less of this Court than to overrule its prior decisions in the Stevedoring cases on the grounds that the principles upon which the stevedoring cases are based are not reconcilable with the principles established in the recent cases of *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976), and *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977)." (Pet. Br. pp. 11-12)

Despite the words "nothing less," the quoted language actually understates what Petitioner asks this Court to do. Petitioner, in fact, claims the power, under both the Import-Export Clause and the Commerce Clause to impose a tax on *any* "act or privilege of engaging in the business of transporting goods moving in interstate or foreign commerce . . . ." (Pet. Br. pp. 13, 32). In other words, while Petitioner purports to ask only for the power to tax stevedores, the *principles* that it asks this Court to adopt include the power to tax *any carrier* of interstate or foreign commerce. In response, we have heretofore explained why we believe existing protection for interstate and foreign *movement* in commerce should be continued.

However, because only stevedoring activities are involved in the facts of this case, we conclude this brief by focusing on the loading and unloading part of the entire interstate and foreign carriage.

By its decisions in *Michelin Tire Corp. v. Wages, supra* (overruling *Low v. Austin*, 80 U.S. (13 Wall.) 29 (1972)), and in *Complete Auto Transit, Inc., supra* (overruling *Spector Motor Service v. O'Connor*, 340 U.S. 602 (1951)), this Court has recently demonstrated that it will not shrink from overruling even the most hoary precedent. Nevertheless we trust that this Court retains its respect for the policies underlying the principle of *stare decisis*. Quite aside from *stare decisis*, we suggest two strong reasons for retaining stevedoring in the protection of movement in foreign and interstate commerce.

The first of these is based upon what we have termed the "tollgate syndrome." That syndrome was feared by the Constitutional draftsmen who imposed the express prohibitions of the Import-Export Clause, and by this Court as it constructed, over a century, an analogous protection for movement in interstate commerce pursuant to the implications of the Commerce Clause. The "pragmatic" approach, urged on this Court by Petitioner and embraced by Respondents, suggests a like protection for stevedoring. We believe we have already demonstrated (in part II C, *supra*) that stevedoring is an ideal vehicle for a tollgate abuse. The language of the cases that protected movement over a century prior to *Western Live Stock* may have an archaic ring to modern legal scholars, but there was a pragmatic wisdom underlying those decisions as applied to the facts of those cases—movement in foreign and interstate commerce. If a pragmatic view is to be taken of the existing and potential abuse of an excise imposed by a seaport jurisdiction, the fact that stevedoring is performed "wholly within the territorial limits of the State of Washington" (Pet. Br. p. 4), and (by reason of separate

invoicing) is "self-apportioning" (Pet. Br. p. 22), is not a consideration entitled to weight. See discussion at Part II C, *supra*.

We close this argument directed to the pragmatic view of the tollgate syndrome with an observation about this Court's decision in the second stevedoring case, *Carter & Weekes, supra*. That decision was made 10 years after the so-called "modern" doctrine enunciated in *Western Live Stock, supra*. There was ample time for reflection. A careful reading of that decision will show that this Court was aware of virtually every argument presented to it by Petitioner—and the arguments were couched in modern terms. For example, the issue of multiple imposition was directly addressed in that case. This Court reasoned that if the carriage by the interstate carrier could be taxed at one end, it could be taxed at the other end and in the middle. 330 U.S. at 427-30. Clearly, that reasoning is correct if a pragmatic view is taken of the tollgate syndrome. That view requires, as in the first stevedore case (*Puget Sound, supra*), *that the interstate carriage must be regarded as including the loading and unloading as well as the journey itself.*[22] If apportionment will not save a tax on the *middle segments* of the journey it should not save a tax on the *end segments*. That should be true whether the apportionment be by formula or "self-apportionment."

A second reason for retaining stevedoring in the continued protection of foreign and interstate carriage is consistency with related fields of law. In treating loading and

22. If this Court were to decide otherwise, the resulting rule would also be inconsistent with the physical reality that the goods have not become part of the mass of property within the state—and the foreign or interstate commerce is not complete—until the goods have been unloaded from the vessel.

unloading as the responsibility of the foreign and interstate carrier, this Court has decided consistently with maritime common law,[23] federal statutes,[24] and international agreements[25] governing the carriage of goods by sea.

Moving that boundary line to separate loading and discharge of goods from the carriage of those goods would contravene the long-established principle that such carriage begins and ends with the goods at a place of rest on the dock:

> "'[I]t is as much the duty of the shipowner to load and discharge the cargo as it is to carry it between the loading and discharging ports.'" *Union Marine & General Ins. Co. v. American Export Lines, Inc.*, 274 F. Supp. 123, 128 (S.D.N.Y. 1966), quoting *Munson S.S. Line v. Glasgow Nav. Co.*, 235 F. 64 (2d Cir. 1916), *cert. denied*, 243 U.S. 643 (1917), *appeal dismissed*, 246 U.S. 647 (1918).[26]

23. *See Ex Parte Easton*, 95 U.S. 68, 75-76 (1877); *The Eddy*, 72 U.S. (5 Wall.) 481, 495 (1867); *Calcot, Ltd. v. Isbrandtson Co.*, 318 F.2d 669, 673 (1st Cir. 1963); *American President Lines, Ltd. v. Federal Maritime Board*, 317 F.2d 887, 888 (D.C. Cir. 1962).

24. The Carriage of Goods by Sea Act, 46 U.S.C. § 1303, governing foreign commerce, defining carrier responsibility (and liability) provides in pertinent part:

> "(2) The Carrier shall properly and faithfully load, handle, stow, carry, keep, care for, and discharge the goods carried."

The Harter Act, 46 U.S.C. § 190, governing interstate and foreign maritime commerce, likewise provides:

> "It shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in property loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge."

25. Convention for the Unification of Certain Rules Relating to Bills of Lading for the Carriage of Goods by Sea, *Concluded* August 25, 1924, 51 Stat. 233, T.S. No. 931, article 3, §§ 2 and 8. The pertinent sections of this international agreement are substantially the same as 46 U.S.C. §§ 1303(2) & 190, quoted in note 24, *supra*. See Appendix A to this brief.

By way of elaboration,

> "'The personal services of watchmen or stevedores . . . are necessary to enable the ship to discharge her maritime duty . . . ; *they are rendered in the course of the voyage . . .*'" *Union Marine*, *supra* at 128, quoting *The Seguranca*, 58 F. 908, 909 (S.D.N.Y. 1893) (emphasis supplied).

Thus, the loading and discharge of cargo are no less the carrier's obligation merely because they are physically accomplished by stevedores rather than members of the ship's crew:

> "The work of loading and unloading is historically 'the work of the ship's service.' [Citation omitted.]
>
> ". . . The shipowner is not relieved of these responsibilities by turning control of the loading or unloading of the ship over to a stevedoring company . . . ." *Crumady v. The Joachim Hendrik Fisser*, 358 U.S. 423, 427-28 (1959).[27]

26. *See also Ex Parte Easton*, 95 U.S. 68, 75-76 (1877); *The Eddy*, 72 U.S. (5 Wall.) 481, 495 (1867); *Calcot, Ltd. v. Isbrandtson Co.*, 318 F.2d 669, 673 (1st Cir. 1963); *Isthmian S.S. Co. v. California Spray-Chemical Corp.*, 300 F.2d 41 (9th Cir. 1962); *Baltimore & O.R. Co. v. United States*, 201 F.2d 795, 796-97 & n.3 (3d Cir. 1953); *The Titania*, 131 F. 229, 230 (2d Cir. 1904); *Toyamenka, Inc. v. S.S. Tosoharu Maru*, 392 F. Supp. 450 (S.D.N.Y. 1974); *cf. Lagomarsino v. Pacific Alaska Navigation Co.*, 100 Wash. 105, 112, 170 P. 368 (1918).

The scope of carriage by sea cannot be limited to exclude the loading and discharge of goods regardless of contrary contractual terms. 46 U.S.C. §§ 1303 (8), 190; *Levatino v. American President Lines, Ltd.*, 233 F. Supp. 697, 701 (S.D.N.Y. 1964); *Brown & Williamson Tobacco Corp. v. The S.S. Anghyra*, 157 F. Supp. 737, 749 (E.D. Va. 1957), *modified on other grounds sub. nom. Hellenic Lines, Ltd. v. Brown & Williamson Tobacco Corp.*, 277 F.2d 9 (4th Cir.), *cert. denied*, 364 U.S. 879 (1960).

27. *Accord, Ferrante v. Swedish Am. Lines*, 331 F.2d 571 (3d Cir.), *cert. denied*, 379 U.S. 801 (1964); *Inland Waterways Shippers Ass'n v. Mississippi Valley Barge Line Co.*, 194 F. Supp. 818, 822 (E.D. Mo. 1960), *appeal dismissed*, 289 F.2d 374 (8th Cir.), *cert. denied*, 368 U.S.

To summarize, the movement of goods by sea in interstate and foreign commerce: (a) begins with the goods at a point of rest on the dock of departure; (b) includes the loading and stowage of the goods on board the vessel, the vessel's transit from port of departure to port of destination, and the unloading or discharge of the goods from the vessel; and (c) ends when the goods have reached a point of rest on the dock at destination. Curtailment of this long-settled scope of the carriage by sea would fly in the face of the United States' international agreements, its statutes, and centuries of common law.

Thus, we see that the existing line of protection established by this Court's decisions have solid rationales behind them. We suggest that there is no equally satisfactory rationale for drawing another line.

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876 (1961); *cf. Levatino Co. v. M/S Helving Torm*, 295 F. Supp. 725 (S.D.N.Y. 1968).

Moreover, the loading and discharge of goods is no less the carrier's obligation where the shipper, not the carrier, obtains or pays for the services of the stevedoring company:

> "Regardless of what individual or company does the actual manual loading of a barge, a water carrier cannot avoid its common law and statutory duty to properly load, stow and discharge the cargo. Therefore, it makes no difference whom the stevedores were representing, *the duty to properly load* and use reasonable care in the transportation of *the cargoes in question rested upon the defendant* [carrier]." *Inland Waterways, supra*, at 822 (emphasis supplied).

Accord, *International Drilling Co. v. M/V Doriefs*, 219 F. Supp. 479, 488 (S.D. Tex. 1968); *Mondella v. S.S. Elie V*, 223 F. Supp. 390, 392 (S.D.N.Y. 1963).

CONCLUSION

We have emphasized the express prohibition of the Import-Export Clause (Petitioner aptly terms it a "flat" prohibition). This Court has shown that Clause the respect that express language in the Constitution deserves. It has consistently refused to abridge the plain language of the Import-Export prohibition — including, for example, in cases where abridgment is sought because a tax is asserted to be nondiscriminatory.

It is stipulated in the instant case (by incorporation of the *Puget Sound Stevedoring Co.* facts) that imports and exports are involved here. Quite aside from this Court's prior decisions that excises on the carrier are within the scope of the Clause, the physical reality of the instant facts—that the process of loading and unloading is involved—make clear that the subject imports and exports are in the "process" of importing and exporting.

We have also addressed the purpose of the Import-Export Clause, as this Court has explained that purpose from the earliest days of its history through recent times. In addressing the purpose of the Clause, we have described a concern of the Constitutional draftsmen with what we have termed the "tollgate syndrome". Our argument on that point under the Import-Export Clause logically has become intertwined with our argument under the Commerce Clause. We have suggested that this Court has also evidenced a concern with the tollgate syndrome in its decisions involving *movement* in commerce. It is that concern, and not the rhetoric of the older versus the more recent cases, that has distinguished the *movement* cases

under the Commerce Clause from the *transactional* cases (involving sales, advertising and commissions on sales).

The tollgate syndrome operates under circumstances where a jurisdiction controlling a commerce gateway, such as a seaport, can broaden its tax base at the expense of nonresidents. Stevedoring clearly provides an ideal means of exacting a toll. The fact that it occurs "wholly within the territorial limits of the State of Washington" is without relevance when a pragmatic view is taken of the tollgate syndrome. As this Court recognized in the celebrated case of *Brown v. Maryland*, a toll on imports and exports can be as easily levied when the goods are landed as when they enter the harbor. In its economic effect, the tax imposed by Petitioner is such a toll and, therefore, violative of the Import-Export and Commerce Clauses of the United States Constitution.

Respondents respectfully request the Court to affirm the decision of the Washington Supreme Court, holding unconstitutional Petitioner's attempt to impose its business and occupation tax on the stevedores' loading and unloading of goods in foreign and interstate commerce.

Respectfully submitted,

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APPENDIX A

INTERNATIONAL AGREEMENT:

Convention for the Unification of Certain Rules Relating to Bills of Lading for the Carriage of Goods by Sea, *concluded* August 25, 1924, 51 Stat. 233, T.S. 931, art. 3, §§ 2 & 8:

2. Subject to the provisions of Article 4 the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

. . . . .

8. Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with goods arising from negligence, fault, or failure in the duties and obligations provided in this article, or lessening such liability otherwise than as provided in this convention, shall be null and void and of no effect. A benefit of insurance in favor of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability.

STATUTES: Washington Revised Code:

82.04.260 Tax on buyer and wholesaler of grains and dry peas—Flour manufacturers—Seafood products manufacturers—Fruit and vegetable processors—Aluminum manufacturers—Research and development organizations—Perishable meat products processors and wholesalers—Nuclear fuel assemblies—Travel agents. (1) Upon every person engaging within this state in the business of buying wheat, oats, dry peas, corn, rye and barley, but not including any manufactured or processed products thereof, and selling the same at wholesale; the tax imposed shall be equal to the gross proceeds derived from such multiplied by the rate of one one-hundredth of one percent.

(2) Upon every person engaging within this state in the business of manufacturing wheat into flour; as to such persons the amount of tax with respect to such business shall be equal to the value of the flour manufactured, multipled by the rate of one-eighth of one percent.

(3) Upon every person engaging within this state in the business of splitting or processing dried peas; as to such persons the amount of tax with respect to such business shall be equal to the value of the peas split or processed, multiplied by the rate of one-quarter of one percent.

(4) Upon every person engaging within this state in the business of manufacturing seafood products which remain in a raw, raw frozen, or raw salted state at the completion of the manufacturing by that person; as to such persons the amount of tax with respect to such business shall be equal to the value of the products manufactured, multiplied by the rate of one-eighth of one percent.

(5) Upon every person engaging within this state in the business of manufacturing by canning, preserving, freezing or dehydrating fresh fruits and vegetables; as to such persons the amount of tax with respect to such business shall be equal to the value of the products canned, preserved, frozen or dehydrated multiplied by the rate of three-tenths of one percent.

(6) Upon every person engaging within this state in the business of manufacturing aluminum pig, ingot, billet, plate, sheet (flat or coiled), rod, bar, wire, cable or extrusions; as to such persons the amount of the tax with respect to such business shall be equal to the value of the products manufactured multiplied by the rate of four-tenths of one percent.

(7) Upon every nonprofit corporation and nonprofit association engaging within this state in research and development, as to such corporations and associations, the amount of tax with respect to such activities shall be equal to the gross income derived from such activities multiplied by the rate of forty-four one-hundredths of one percent.

(8) Upon every person engaging within this state in the business of slaughtering, breaking and/or processing perishable meat products and/or selling the same at wholesale; as to such persons the tax imposed shall be equal to the gross proceeds derived from such sales multiplied by the rate of thirty-three one hundredths of one percent.

(9) Upon every person engaging within this state in the business of making sales, at retail or wholesale, of nuclear

fuel assemblies manufactured by that person, as to such persons the amount of tax with respect to such business shall be equal to the gross proceeds of sales of the assemblies multiplied by the rate of twenty-five one-hundredths of one percent.

(10) Upon every person engaging within this state in the business of manufacturing nuclear fuel assemblies, as to such persons the amount of tax with respect to such business shall be equal to the value of the products manufactured multiplied by the rate of twenty-five one hundredths of one percent.

(11) Upon every person engaging within this state in the business of acting as a travel agent; as to such persons the amount of the tax with respect to such activities shall be equal to the gross income derived from such activities multiplied by the rate of twenty-five one-hundredths of one percent.

82.04.330 Exemptions—Agriculture. This chapter shall not apply to any person in respect to the business of growing or producing for sale upon his own lands or upon land in which he has a present right of possession, any agricultural or horticultural produce or crop, including the raising for sale of any animal, bird, or insect, or the milk, eggs, wool, fur, meat, honey, or other substance obtained therefrom, or in respect to the sale of such products at wholesale by such grower, producer, or raiser thereof. This exemption shall not apply to any person selling such products at retail or using such products as ingredients in a manufacturing process; nor to the sale of any animal or substance obtained therefrom by a person in connection with his business of operating a stockyard or a slaughter or packing house; nor to any person in respect to the business of taking, cultivating, or raising Christmas trees or timber; nor to any association of persons whatever, whether mutual, cooperative or otherwise, engaging in any business activity with respect to which tax liability is imposed under the provisions of this chapter.

82.04.430 Deductions enumerated. In computing tax there may be deducted from the measure of tax the following items:

(11) By those engaged in banking, loan, security or other financial businesses, amounts derived from interest received on investments or loans primarily secured by first mortgages or trust deeds on nontransient residential properties; . . .

82.04.500 Tax part of operating overhead. It is not the intention of this chapter that the taxes herein levied upon persons engaging in business be construed as taxes upon the purchasers or customers, but that such taxes shall be levied upon, and collectible from, the person engaging in the business activities herein designated and that such taxes shall constitute a part of the operating overhead of such persons.

82.16.020 Public utility tax imposed. There is levied and there shall be collected from every person a tax for the act or privilege of engaging within this state in any one or more of the businesses herein mentioned. The tax shall be equal to the gross income of the business, multiplied by the rate set out after the business, as follows:

(1) Railroad, express, railroad car, water distribution, light and power, telephone and telegraph businesses: Three and six-tenths percent;

(2) Gas distribution business: Three percent;

(3) Urban transportation business: Six-tenths of one percent;

(4) Vessels under sixty-five feet in length, except tugboats, operating upon the waters within the state: Six-tenths of one percent;

(5) Motor transportation and tugboat businesses, and all public service businesses other than ones mentioned above: One and eight-tenths of one percent.

APPENDIX B

The importance of agriculture in Washington relative to other industries is indicated by the data below, considered in conjunction with the data on the following page, showing that agriculture (combining wheat, fruits and vegetables) ranks third among the state's exports even though less than one-fourth of the nearly two billion dollars of agricultural production is exported.

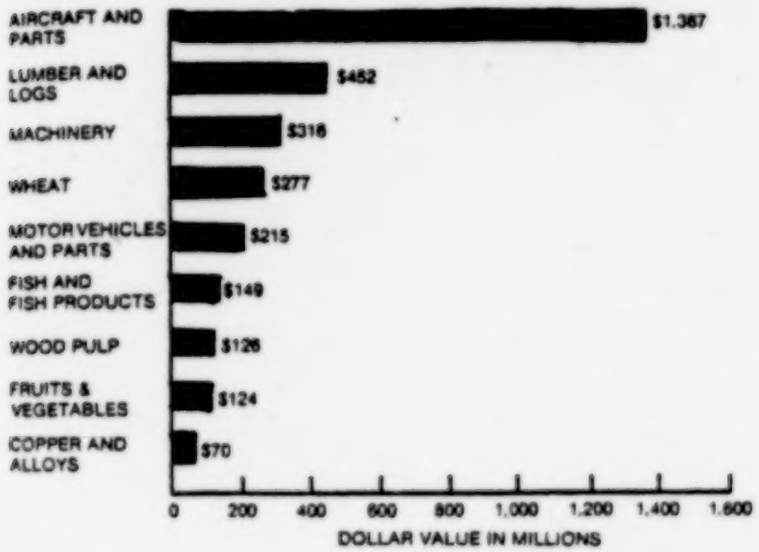
TONNAGE AND VALUE, CROPS, LIVESTOCK AND LIVESTOCK PRODUCTS WASHINGTON, 1975-76

Value		
1975	1976 Preliminary	Percent of Previous Year
— 000 Dollars —		Percent
1,077,227	941,120	87.4
26,045	30,533	117.2
208,846	258,726	123.9
12,747	14,495	113.7
93,933	89,938	95.7
1,418,798	1,334,812	94.1
120,356	122,000	101.4
454,375	521,982	114.9
1,993,529	1,978,794	99.3

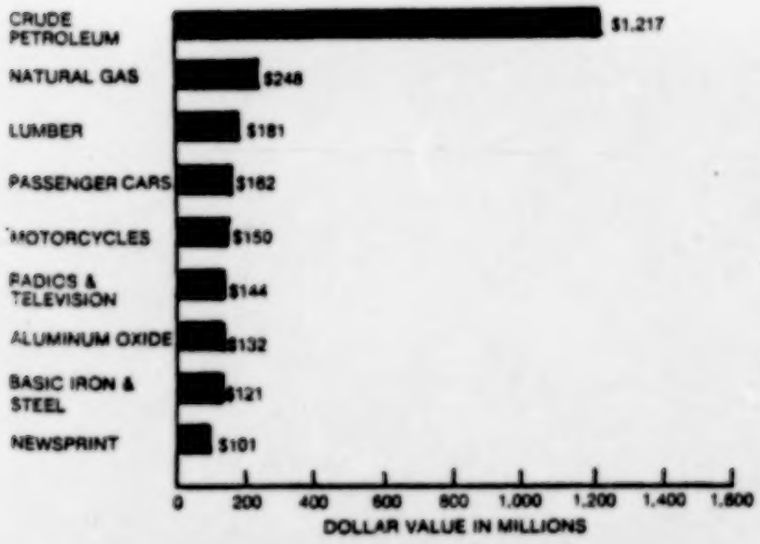
Source: Washington Crop & Livestock Reporting Service, Washington Department of Agriculture, and United States Department of Agriculture Statistical Reporting Service; Washington Agricultural Statistics 1976, at 5 (1976).

FOREIGN TRADE — LEADING COMMODITIES
Leaving and Entering Washington Ports
1975

Exports



Imports



NOTE: "WASHINGTON PORTS" MEANS THE SEATTLE CUSTOMS DISTRICT. IT INCLUDES ALL WASHINGTON PORTS EXCEPT VANCOUVER, LONGVIEW AND KALAMA, WHICH ARE PARTS OF THE PORTLAND, OREGON CUSTOMS DISTRICT.

SOURCE: DEPARTMENT OF COMMERCE AND ECONOMIC DEVELOPMENT. (C-06)

State of Washington, Office of Program Planning & Fiscal Management, Pocket Data Book 1976, at 23 (December, 1976).